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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

CHAS S. BOHLER, Tax Collector of Richmond County, Georgia;

C. A. STEED, Tax Receiver of Richmond County, Georgia;

J. T. PLUNKETT, Sheriff of Richmond County, Georgia;

STATE OF GEORGIA; RICHMOND COUNTY; and BOARD OF EDUCATION of Richmond County, Georgia;

Appellants,

vs.

E. H. CALLAWAY, As Executor of the Estate of J. B. White,

Appellee.

170-171

Nos. ~~551-552~~.

Appeal from United States District Court for the Southern District of Georgia, Northeastern Division.

In Equity

SUPPLEMENTAL AND REPLY BRIEF FOR APPELLEE IN MAIN APPEAL No. 551 AND FOR APPELANT IN CROSS APPEAL No. 522, BY E. H. CALLAWAY AND WM. M. HOWARD.

INDEX OF SUBJECTS

	Page
Tax Discrimination	3
Tax Act of 1918 Not Applicable to this Case	5
Interest and Tender	7
Reply Brief	9

INDEX OF CASES CITED

	Page
Atwood vs. Weems, 99 U. S. 183	7 and 8
Bennett vs. Hunter, 9th Wall. 326	7
Cogburn vs. South Carolina R. R. Co., 32 Fed. 316 Affirmed in 142 U. S. 101	9
Cheney vs. Bilby, 74 Fed. 52	7
Chicago B. & Q. R. R. vs. Chicago, 166 U. S. 226	4
Davis vs. Peugh, 113 U. S. 542	8
Hills vs. Exchange Bank, 105 U. S. 321	7
Sunday Lake Iron case—247 U. S. 350	9
Southern Rwy Co. vs. Watts, 260 U. S. 519	10
Sioux City Bridge Co. vs. Dakota County, 260 U. S. 441	10
First National Bank vs. Weld Co., U. S. Advance Sheets	11
U. S. vs. Merriam, 263 U. S. 179	11

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TAX DISCRIMINATION

Counsel for the tax officials in the above stated cause, in citing and seeking to apply a large number of decisions in tax cases have ignored the unusual and almost exceptional character of the Georgia Statues on the subject of assessment and collection of taxes, and have apparently overlooked the fact that the charge of discrimination in this case is two-fold, namely:

1. The generally low condition of returns and assessments on intangible personal property in Georgia, known to all of the officers of the State and acquiesced therein, in which field, from the very nature of the case, it is impossible to produce exhaustive testimony. But even in this class, we start out with the testimony of the Tax Receiver himself, that he had never undertaken to assess any property at the full market value, and that they had a rule in Richmond County not to assess at the full market value, and that no property in Richmond County was intended to be assessed at the full market value, and that "the Board of Assessors never go over two-thirds valuation and on mortgages or stocks, they take it at 50 cents on the dollar."

We also had the testimony of the Board of Assessors and their assessment of these securities,—the same securities in this case for the year 1918—which was a less percentage than was fixed by the Board of Arbitrators.

There was other evidence of tax assessors and tax officials and other county officers and State officers, and reports from State Tax officials, showing the very low percentage of taxes assessed, or collected, on intangible personal property, as well as on all other property in the State.

2. The other was the individual discrimination against the White estate in selecting this estate as the only one out of a large number in Richmond County, to pursue for back taxes, apparently for the sole reason that the estate was very large,

and no one of the others amounted to as much as a million dollars.

This selection of the White estate as the only one of all of these estates to proceed against, apparently was the act of the attorneys, under their contract with the County Commissioners of October 14th, 1915 (P. R. p. 159-161), where the attorneys were expressly authorized and empowered to institute such proceedings as they may deem necessary to enforce the payment of taxes upon property in said County not heretofore taxed and for which services, in that contract, they were to be paid 33 1-3% of the gross amount of taxes recovered. These attorneys, proceeding in this case, became the representative of the State and County.

See Chicago, B. & Q. R. R. vs. Chicago, 166 U. S. 226, 2nd syllabus, and note language at the bottom of page 233 and top of page 234 where it is stated that "he who acts in the name and for the State is clothed with the State's power, and his act is that of the State. And if he discriminates against one taxpayer in a particular class and does so willfully and deliberately, it is the State violating the equal protection clause of the Fourteenth Amendment."

Can there be any question about the conclusiveness of the evidence in this case as to this willful discrimination?

The White estate was one of a class of some two hundred estates in Richmond County, the inventories of whose estates showed the ownership of similar securities and intangible assets as those owned by the White estate. The certified copies of such inventories were produced in the record; also certified copies of the tax returns made by these decedents during their lifetime, showing that they had not returned any of these assets for taxation. Some of the inventories showed that necessarily much of these intangible assets, such as notes, had been actually owned for a longer period that seven years prior to the deaths of the decedents, and yet the White estate is the only single one proceeded against, except the

Benson estate, where the back taxes were adjusted in 1916, and where the attorneys employed by the County represented the Benson Estate, and not the tax officials. So that the collection of back taxes in that estate could not be charged to the credit of the attorneys, and the only estate which, under this broad, roving commission, they have pursued, has been the White Estate, and apparently from the reply affidavit of the Chairman of the Board of County Commissioners, the White Estate was the only one among them which seemed to be worth a million dollars or more.

Therefore, we respectfully contend that the charge of deliberate, willful, intentional discrimination, is made out.

In addition to this we desire to call the court's attention to a decision rendered by District Judge Ricks, from the District Court of Ohio, in Myer vs. Shields, reported in 61 Fed. Rep. 713, where the court had before it the constitutionality of an act for the assessment of back taxes, and under that act the officer upon whom the law conferred the duties and powers which the court characterized as "arbitrary" and "summary", received a commission of 4% for the taxes he collected, and held that such interest of the officer in his summary and arbitrary assessments, disqualified him. On ages 726 to 729 inclusive, the court discussed this matter fully and recognized the doctrine that "he who has an interest in litigation, ought not himself to be the judge."

It is in this same case that the Court cites a great many authorities on the subject of "Due Process."

ON CROSS APPEAL, CASE No. 552.

TAX ACT OF 1918 NOT APPLICABLE TO THIS CASE.

In our former Brief, at the top of page 125, we call attention to the fact that under the express language of the Act of 1918 it was not applicable to the facts of this case.

The 5th Section of that Act, which it is contended repealed the General Arbitration Act of 1910 and confined the taxpayer to the remedy of appealing to a court of equity, commences as follows:

> "That if the delinquent, or his personal representatie or representatives, as provided under Section 3 of this Act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property, etc. for taxation."

So that by the express language of the Act, it applies only in case the delinquent, or his personal representative or representatives, refuses or fails to return such property after notice to him.

In this case the Executor of the White Estate, after receiving the notice, made the Return (P. R. p. 88-89). It is true that the Tax Receiver rejected the Return as too small and made the much larger assessment, but nevertheless a return was made, and under the strict construction of tax statutes in Georgia, the provision of Section 5 of the Act of 1918, had no application.

On the other hand, by the express language of the Tax Arbitration Statutes of 1910, set forth in our main brief, page 31 the provision is as follows:

> "Where the property subject to State tax is such as is returnable annually to the tax receiver of the county, that officer shall assess the same at the valuation fixed in the annual return, if satisfactory to him; if not, he shall, within thirty days after receiving said returns, make an assessment of said property from the best information he can procure, and notify in writing the person or officer making the returns, who shall have the rivilege, within twenty days after receiving such notice, to refer the question to arbitration."

INTEREST AND TENDER.

In support of the contention of the Appellant on the Cross-Appeal that the court erred in the allowance of interest on the taxes as fixed by the arbitrators and as already paid, we desire to cite the following authorities:

In Cheney vs. Bilby, decision by the 8th Circuit Court of Appeals, 74 Fed. 52, the 2nd and 3rd headnotes are as follows:

> "2. Failure of the holder of notes payable at a particular place, to have them at such place on the day they become due, so that the agent to make the collection refuses to receive the same when tendered, deprives the holder of any right to subsequent interest, where it does not appear that the debtor has realized any interest on the money tendered.
>
> "3. In order to stop interest, it is not necessary that one making a tender should set the money aside and hold it continuously subject to the order of the creditor, but he may use it as his own and is only under obligation to be ready at all times to pay the debt in current money when requested. Curtiss vs. Greenbacks, 24 Ver. 536."

In Hills vs. Exchange Bank, 105 U. S., on page 321, the Supreme Court held as follows:

> "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender, or offer to perform, is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. Citing Bennett vs. Hunter, 9th Wall. 326; Tacey vs. Irwin 18 Wall. 549; Atwood vs. Weems, 99 U. S. 183.

In the case of Atwood vs. Weems, 99 U. S. 186, the court cited from both the Bennett case and the Tacey case, and in the latter case they used this language:

> "The case of Tacey vs. Irwin went further and held that neither payment nor actual tender was indispensable, but that a refusal to receive the taxes rendered any manual tender unnecessary. If the party offered to pay, was ready to pay, and was told it would not be accepted, it defeated the sale as much as payment."

In Peugh vs. Davis, 113 U. S., on page 542, in discussing a tender, the court held as follows:

> "The short answer to all this is, that Mr. Peugh owed the money he had borrowed from Davis. What he is now claiming in the original suit, is the right to pay the money and have a reconveyance of the land. Nothing hindered, during all this time, that he should pay this money; and if, as he alleged, Davis denied his right to do so, then he should have made a regular and lawful tender of the amount due."
>
> "If he had done so, the interest would have ceased to run against him, and the amount that he is now required to pay would have been diminished by more than one-half.
>
> "A lame attempt is made to show that he did make this tender. Some evidence is offered that he told Davis that he was ready to account with him and pay what was due, and that he had the money with him.
>
> "But in order to make a tender that would have caused the interest to cease, he should have ascertained for himself the sum due or have fixed upon a sum which was sufficient, and then made a formal tender by counting out or offering that sum to Davis, distinctly and directly, as a tender.

In Cogburn vs. South Carolina Realty Co., 32 Fed. Rep. 316, the 1st headnote is as follows:

> "When, upon a claim for money, the debtor, before suit brought, tenders a certain sum in lawful tender, absolutely and without condition, to his creditor, and this is refused, he may retain the money, and on suit brought against him, will be relieved from the payment of interest after the date of the tender and from payment of cost, if plaintiff recover no more than the sum tendered."

This same case went to the Supreme Court of the United States and is reported in 142 U. S. p. 101, and while the decision is affirmed, the question on the subject of tender decided by the District Court of South Carolina, was not referred to, so that it must have met the approval of the court.

REPLY BRIEF

The Sunday Lake Iron Case in 247th U. S. 350, has no application to the facts of this case. There is no issue in this case as to whether the tax officials have made an error in judgment. The deliberate purpose of the attorneys who instituted this proceeding against White's estate, was to collect not only full taxes, but more than full taxes, as they included the stocks of National Banks of New York, and an additional error which the Tax Receiver says was from $130,000 to $150,000, but on actual calculation amounts to approximately $200,000, and in all of the roceedings instituted, the mandamus proceeding in the State Court, the petition for injunction in the State court against the arbitration, and in the equitable petition in the State Court to set aside the award of the arbitrators the whole express purpose was to collect full taxes, with interest, for each of the years, on these assessments, over and beyond even their information or proof as to actual value. And they never stopped their efforts, even as to the tax on the National Bank stocks until District Judge Evans, at the beginning of this case, positively enjoined the collection

on said bank stocks, and the evidence introduced as to the universal rule of all tax officials in this State, both State and County, to tax these securities at a mere nominal value, shows the deliberate intention of the attorneys and officers bringing this suit, to discriminate.

But this case does not rest upon this proposition. All decedents owning securities of like character in Richmond County, constituted a class, and when one was picked out to proceed against, and all the others, in spite of actual notice of their existence, were left alone, the willful, intentional discrimination is completely proven on that ground.

The same comments apply to the case of Southern Railway vs. Watts, 260 U. S. 519.

See also the case of Sioux City Bridge Co. vs. Dakota County, 260 U. S. 441, where the headnotes are as follows:

> "1. Intentional and arbitrary assessment of the property of one owner, for taxation, at its true value, in accordance with the State Constitution and laws, while all other property is systematically assessed much lower, is a violation of the equal protection clause.
>
> "2. The owner, aggrieved by this discrimination, is entitled to have his assessment reduced to the common level, since by no judicial proceeding can he compel re-assessment of the great mass of such property at its true value as the law requires.
>
> "3. Mere errors of judgment in fixing an assessment, do not support a claim of discrimination. There must be in effect an intentional violation of the principal of practical uniformity."

We respectfully invoke the principles of this decision and under them contend that the discrimination charged in this case has been abundantly and overwhelmingly proven, both as to the individual, in a class of decedents, and as to all other

taxpayers of the State in the percentage of property taxed, both in the returns and in the assessments.

Opposing counsel quote the case of First National Bank vs. Weld Company, a recent decision by this Court appearing in the advance sheets.

On page 115 of opposing counsels brief, the latter part of the quotation is as follows:

> "It does not appear from the complaint that plaintiff applied to any of the taxing authorities to reduce the assessment of its proerty, or correct the alleged inequalities, prior to the final levy of the tax; but some time after such levy had been completed, made application for abatement and rebate, which application was approved by the County Board, but disallowed by the State Tax Commission."

In this case every application permitted by law, and every remedy provided by law, has been made by the taxpayer in spite of the opposition of opposing counsel, and an appeal to the courts for an injunction against an arbitration under the Arbitration Laws of the State, which was held, and the Supreme Court of Geirgia affirmed the taxpayer's right to such arbitration, and the legality of the Board organized for that purpose.

The validity and legality of the award so made by the arbitrators was attacked by opposing counsel in the name of the State and yet the award was affirmed by the State Court, and the decision affirmed by the Supreme Court of Georgia.

In support of the Georgia authorities requiring a strict construction of Tax Statutes, we cite the case of U. S. vs. Merriam, 263 U. S. 179, where the 3rd headnote or syllabus is as follows:

> "Taxing Statutes are not to be extended by implication beyond the clear import of the language used;

and doubt as to the meaning of their words, must be resolved against the Government, and in favor of the taxpayer."

While this was applied in a U. S. estate tax case arising under the Acts of Congress, it announces a well recognized principle, and we cite it in support of our contention of the construction of the Georgia Tax Act of 1918.

Opposing counsel sets forth in their last brief, a number of figures on pages 129 to 133, inclusive.

There are so many patent errors in their method of calculation, that even calculating what they claim should be the taxes levied upon property in this instance, at a rate of 32.6%, it is hardly worth while to deal with them. In the first place, they have calculated interest on the entire taxes up to June 1923, when over $27,000, or all of the taxes, including interest as fixed by the award, was paid on September 5th, 1922.

For this reason we have not attempted to check their calculation.

We therefore respectfully insist and urge that the cause on the main appeal be affirmed, and on the cross appeal, be reversed, for the reasons hereinbefore stated.

Respectfully submitted,

Attorneys for Estate of J. B. White, Appellee in Main Appeal, and Appellant in Cross Appeal.